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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 353

SEAGRAM-DISTILLERS CORPORATION,
Petitioner,

vs.

NEW CUT RATE LIQUORS, INC., ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Seagram-Distillers Corporation, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on May 23, 1957.

CITATIONS TO OPINIONS BELOW.

The opinions of the Court of Appeals, which are unreported, are printed in Appendix A hereto, *infra*, pp. A1-15.

An earlier opinion of the Court of Appeals affirming a preliminary injunction issued by the District Court is reported in 221 F. 2d 815, certiorari denied, 350 U. S. 828. The District Court's Findings of Fact, Conclusions of Law and Order with respect to the preliminary injunction

(I R. 30-35) are printed in Appendix B hereto, *infra*, p. A16. The District Court's Findings and Conclusions on final hearing are found at II R. 57-60.[1]

JURISDICTION.

The judgment of the Court of Appeals was entered on May 23, 1957. A timely petition for rehearing was filed on June 7, 1957 and denied on June 24, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., § 1254(1).

QUESTIONS PRESENTED.

1. Whether in a diversity case where a plaintiff seeking an injunction, charges wrongful acts "which have, or will, injure a right" for which protection is sought, the jurisdictional amount is measured by the value of the right to be protected, or by the dollar amount of the injury caused or threatened.

2. Whether the court below violated Rule 52(a), Federal Rules of Civil Procedure, in disregarding uncontradicted evidence which showed that, even on the court's own theory, the injury to plaintiff caused by defendants' conduct would exceed $3,000.

STATUTES INVOLVED.

The statutes involved are 28 U. S. C. A. § 1332 and the Illinois Fair Trade Act, Ill. Rev. Stat. (1955), c. 121½, §§ 188-191, which are printed in Appendix C, *infra*, p. A23.

1. The record in the proceeding in which the preliminary injunction was granted (No. 11275 in the Court of Appeals; No. 137, 1955 Term in this Court) is cited as (I R. . . . .). The record on final hearing (No. 11685 in the Court of Appeals) is cited as (II R. . . . .). The latter by stipulation includes the former. (II R. 7). Ten copies of only the latter part of the record are presently available for distribution to the Court. Pertinent portions of the first part of the record, which is included in the certified transcript, are quoted herein.

STATEMENT OF THE CASE.

In June, 1954 petitioner (hereafter referred to as plaintiff), a Delaware corporation, as the sole person authorized to distribute Seagram alcoholic beverages in Illinois, filed an action to enjoin 52 defendants, respondents herein, liquor retailers in the City of Chicago and citizens of Illinois, from willfully and knowingly advertising or selling Seagram products at less than the prices stipulated by plaintiff in accordance with the Illinois Fair Trade Act (I R. 12-19). Defendants had, in a cooperative advertisement published June 15, 1954, in a Chicago daily newspaper, advertised Seagram products at prices below those stipulated by plaintiff (I R. 46). There is no issue as to defendants' violations of plaintiff's Fair Trade prices.

Plaintiff obtained a temporary restraining order on the same day as the advertisement (I R. 21), which remained in effect until its motion for a preliminary injunction was heard (I R. 24, 27). On July 2, 1954, the District Court issued a preliminary injunction after a hearing and the taking of testimony (App., *infra*, p. A16).

This injunction was affirmed by the Court of Appeals, 221 F. 2d 815 (C. A. 7, 1955). This Court denied certiorari, 350 U. S. 825 (1955). The issue as to whether there was sufficient proof of the jurisdictional amount was argued in both courts.[2]

When the case came on for final hearing the transcript of the proceeding in which the preliminary injunction was granted was stipulated into the record (II R. 7). Certain facts were stipulated by the parties (II R. 5-7), but no additional evidence was introduced on the question of jurisdictional amount. The record on that point thus included

2. See appellant's brief in the Court of Appeals, No. 11275, pp. 15-27; appellee's brief, pp. 24-26; petition for certiorari, No. 137, 1955 Term, p. 20; brief in opposition, pp. 11, 12.

the same evidence as before.[3] The testimony on the point was as follows:

Plaintiff's products are sold under trade names which are widely and favorably known in Illinois (II R. 6, quoted in n. 3). The plaintiff here has executed over 5,000 Fair Trade contracts with Illinois retailers for Seagram products (I R. 98). "The total amount of expenditures * * * in Illinois during the past two or three years in advertising Seagram products * * *" was "a little in excess of $3,000,000" for advertising, as well as promotional work (I R. 86-7). Seagram sells "around 780,000" cases of liquor in Illinois per year (I R. 89); "our volume is greater than anyone else's" (I R. 85).

Two witnesses testified as to the effect of price-cutting in violation of the Fair Trade contracts upon Seagram's sales. Mr. Teece, Vice President in charge of plaintiff's Central Division, was asked (I R. 84):

> "Q. Mr. Teece, based on your experience of more than fifteen years in the liquor industry—
>
> A. 22.
>
> Q. —and your fifteen years with Fair Trade enforcement, and Fair Trade Policy in Illinois, will you tell the Court what in your opinion would be the result of price cutting on Seagram products, and advertising Seagram products at cut prices unless restrained by court order?
>
> * * * * *

3. In a stipulation on final hearing defendants admitted the allegations of the complaint (I R. 15) that (II R. 6):

> Plaintiff herein has for several years prior to the dates mentioned in the complaint expended large sums of money in advertising Seagram products and during the past several years plaintiff expended for such purpose an amount in excess of Five Hundred Thousand Dollars ($500,000.00) in Illinois alone, and the trade-marks, brands or names under which Seagram products are sold have become widely and favorably known to the trade and public generally in Illinois and plaintiff has sold large quantities of each of said products in Chicago and throughout Illinois.

"The Witness: I think it would be disastrous to at least 70 per cent of the retail outlets. I think it would be a form of price war that would put men on the verge of going out of business. On account of general conditions, I think it would put them out of business.

I think it would cut our volume at least 50 per cent in three months' time." (Italics supplied.)

The Fair Trade prices for Seagram's products ranged from $41.00 to $91.00 per case, with most of the prices over $50.00 (I R. 40). It is to be noted that since Seagram's was selling 65,000 cases per month in Illinois, a reduction of 50% would have amounted to 32,500 cases per month, or over $1,625,000 per month at the retail price level. Even though plaintiff's wholesale prices were considerably lower than the retail, the decline in plaintiff's sales would obviously have greatly exceeded $3,000.

This statement as to loss of sales was corroborated by Mr. Teece's testimony that when the defendants advertised that they intended to sell Seagram products at cut rates, he immediately received telephone calls from many retailers (I R. 80-81). The President of the Illinois Package Association, an association of retailers in Chicago (I R. 81)—

"* * * asked me what Seagrams was going to do. He wanted to know immediately what Seagram was going to do with reference to the price cutting. He said, 'I have your merchandise on the shelf. If you don't do something about it, I will take it off the shelf.'

"He also told me he talked to his members that day and he got the same reaction from them."

Mr. Lind, another witness for the plaintiff, who was Vice President and General Counsel of the parent corporation, testified (I R. 100-101):

"* * * We have found every time there is a price break, our product is subject to loss, and our business has been injured, because we can measure it, because

we can see what happens to us in every jurisdiction where there is a price break. It not only injures us, it injures the whole industry, and it injures retailers; in order to sell their products, at a fair profit, retailers have to make a certain mark up in order to live. If the prices of merchandise are going to be cut by some retailers, the little retailer has to cut the price, which means reducing the profit, *but he doesn't handle the goods any more, and that is where we suffer our loss.*"[4]

* * * * *

"*The good will of the trade mark is absolutely almost lost as the result of a price break.* You can see that in the past history of any other items. You can see that in the liquor industry. They stop making brands where the prices have been cut. *The good will that was built up for that trade mark over a period of years is absolutely* lost. There are any number of instances of that." (Italics supplied.)

On cross-examination, when asked to give an example of "where a brand has gone out of existence" because of price cutting, he testified (I R. 102):

"A. Oh, a brand like P. M. in New York.

Q. What happened to P. M.?

* * * * *

A. It is an almost unknown brand as far as New York is concerned.

Q. Just exactly why did it go out of business?

A. Because it was price cut to the bone where nobody wanted to handle it any more."

None of the above testimony was in any way contradicted, and there is no other testimony in the record bearing upon the question.

The trial court made the same findings of fact as those

4. To the same effect was the conclusion of Louis D. Brandeis, in *Cutthroat Prices. The Competition That Kills*, Harper's Weekly, Nov. 15, 1913, that: "Thus a single prominent price cutter can ruin a market for both the producer and the regular retailer."

which had been upheld by the Court of Appeals on the same record when the temporary injunction was granted. In so far as pertinent here, the findings stated (II R. 57-9; I R. 30-32, App., *infra*, pp. A17-18):

> "2. * * * It [plaintiff] has in the past three years expended approximately $3,000,000 in advertising and promoting the sale of Seagram products in Illinois and the trade-marks, brands and names under which Seagram products are sold have become widely and favorably known to the trade and public generally in Illinois.
>
> * * * * *
>
> "7. Unless enjoined defendants intend to continue said conduct complained of, to the irreparable damage of the good will and business of the plaintiff herein and of the producers of said Seagram products, thereby irreparably impairing the value of the trade marks, brands and names under which Seagram products are sold.
>
> "8. Such wrongful conduct of defendants if not enjoined will cause others dealing in Seagram products to fail to comply with the aforesaid Fair Trade contracts, *will substantially decrease the volume of sales of Seagram products in Illinois*, and will irreparably impair the good will of the plaintiff and the good will of the trade-marks, brands and names of the producers of Seagram products, all to the great damage and financial loss of the plaintiff." (Italics supplied.)

The court concluded that "the matter in controversy * * * exceeds the sum of $3,000" and that the court had jurisdiction of the case (II R. 58, 59).

On the second appeal, the Court of Appeals, with Judge Finnegan dissenting (App., *infra*, pp. A13-15), reversed on the ground that the District Court had erred in holding that the amount in controversy exceeded $3,000 (App., *infra*, pp. A1-12). The court held that the principle that the jurisdictional amount was measured by the value of the object or right to be protected applied only when a right

was threatened with total destruction, and that otherwise the amount of actual or threatened damage must be proved. The court then held that plaintiff had failed to prove that a loss of business exceeding $3,000 would take place. (See App., *infra*, pp. A4, 9.) Plaintiff's petition for rehearing was denied on June 24, 1957.

REASONS FOR GRANTING THE WRIT.

Hitherto in Fair Trade and unfair competition diversity cases the courts have held with substantial uniformity that the jurisdictional amount was measured by the value of the right to be protected, and that this was shown by proof of the value of the good will attached to plaintiff's trade name. By restricting this principle to cases in which the right to be protected is completely destroyed—which would seldom occur in this class of cases—the court below has reached a result in conflict with many cases in this field, as well as with the "principle that jurisdiction is to be tested by the value of the object or right to be protected against interference." *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 181 (1936); *Hunt* v. *New York Cotton Exchange*, 205 U. S. 322, 336 (1906); *Bitterman* v. *Louisville & Nashville R. R.*, 207 U. S. 205, 225 (1907); *Glenwood Light Co.* v. *Mutual Light Co.*, 239 U. S. 121, 125 (1915).[3]

In any event, in this case the evidence set forth in the statement shows that even on the Court's own theory there was uncontradicted proof that the injury or damage to plaintiff's rights would exceed $3,000. The decision below in this aspect is in conflict with the decision of the Court of Appeals for the First Circuit in *Lee-Wilson, Inc.* v. *General Electric Company*, 222 F. 2d 850 (C. A. 1, 1955), in which on evidence less substantial than here the Fed-

3. Cases are collected in Annot., 30 A. L. R. 2d 707-721 (1951).

eral court was held to have jurisdiction in a Fair Trade case.

1. The Fifth, Sixth, Eighth, Ninth and Tenth circuits (as well as the Seventh in earlier cases)[6] have held that in unfair competition cases the jurisdictional amount is established by proof that the good will embodied in the plaintiff's trade name has a value exceeding $3,000.

In *Indian Territory Oil & Gas Co.* v. *Indian Territory Illuminating Oil Co.*, 95 F. 2d 711 (C. A. 10, 1938), certiorari denied 305 U. S. 607 (1938), where an injunction was sought to prevent injury to the good will in plaintiff's trade name, the court relied entirely on evidence that plaintiff's assets exceeded $100,000,000 in book value and that its good will had a "monetary value of $100,000." The Tenth Circuit's opinion stated (95 F. 2d at 713):

> "* * * it is said that the evidence fails to show that plaintiff has suffered damages in excess of $3,000, and from this premise it is argued that the sum requisite to jurisdiction is not in controversy. The test, in determining the amount in controversy in a case of this kind presenting a continuing wrong to an established business growing out of unfair trade practices, is not the immediate pecuniary damages arising from the wrongful acts. *It is the value of the business or the right to be protected;* and business reputation or good will is an intangible asset to be taken into consideration in ascertaining the extent of the business or right. * * *" (Emphasis added.)

In *Hanson* v. *Triangle Publications*, 163 F. 2d 74, 79 (C. A. 8, 1947), certiorari denied 332 U. S. 855 (1948), the Eighth Circuit relied upon evidence as to the plaintiff's magazine's circulation, advertising rates, and initial promotion costs as proof of the jurisdictional amount in a suit for infringement of trade name. That court had previously

6. *Harvey* v. *American Coal Company*, 50 F. 2d 832, 834 (C. A. 7, 1931), and the first decision by the court below in this case, 221 F. 2d 815.

held in a similar case that "the sum in controversy is not alone the damage which is claimed to have been done by the defendants but is the value of the property interest in that trade name." *Beneficial Industrial Loan Corporation* v. *Kline*, 132 F. 2d 520, 525 (C. A. 8, 1942), citing the *Indian Territory* case.

In *Ross-Whitney Corp.* v. *Smith Kline & French Laboratories*, 207 F. 2d 190, 194 (C. A. 9, 1953), the Court of Appeals for the Ninth Circuit declared that:

> "* * * the District Court's finding that the amount in controversy exceeds $3,000 is supported by the evidence that SKF had a substantial investment in Dexedrine and its peculiar shape-color-size combination by virtue of the $1,200,000 spent in advertising alone from May 1949 to September 1951."

The court cited its own earlier holding in *Del Monte Special Food Co.* v. *California Packing Corp.*, 34 F. 2d 774, 776-7 (C. A. 9, 1929), that an allegation "that the value of the good will involved is more than $2,000,000 and more than $11,000,000 has been spent in advertising" is sufficient.

The Fifth Circuit, in *Seaboard Finance Company* v. *Martin*, 244 F. 2d 329, 330 (C. A. 5, 1957), held that allegations of substantial expenditures for advertising and a large volume of business were sufficient on a motion to dismiss to establish that the value of the "good will" represented by a "trade name" exceeds $3,000.

In *Wisconsin Electric Co.* v. *Dumore Co.*, 35 F. 2d 555, 556-7 (C. A. 6, 1929), the Sixth Circuit reversed a District Court holding that the value in controversy was "the damage to the complainant," and held that the value of plaintiff's trade name, which was the right sought to be protected, was the criterion.

The Fourth Circuit has also "expressly held that in a suit of this kind the value of the good will is the amount in controversy." *Safeway Stores* v. *Suburban Foods*, 130

F. Supp. 249, 252 (E. D. Va., 1955), referring to *General Shoe Corporation* v. *Rosen*, 111 F. 2d 95, 99 (C. A. 4, 1940).[7]

This Court pointed out in *Old Dearborn Co.* v. *Seagram Corp.*, 299 U. S. 183 (1936) that (p. 193) "The essence of the statutory violation" under the Fair Trade acts consists "in a forbidden use of the trade-mark, brand or name in accomplishing" the disposition of the product. "The primary aim of the law is to protect the property—*namely, the good will*—of the producer, which he still owns." (*Ibid.*) The statute "proceeds upon the theory that the sale of identified goods at less than the price fixed by the owner of the mark or brand *is an assault upon the good will*, and constitutes what the statute denominates 'unfair competition'" (p. 195). "And *good will is property in a very real sense*, injury to which, like injury to any other species of property, is a proper subject for legislation. Good will is a valuable contributing aid to business—sometimes the most valuable contributing asset of the producer or distributor of commodities. And distinctive trade marks, labels and brands, are legitimate aids to the creation or enlargement of such good will" (p. 194). (Italics supplied.)

Thus the Fair Trade acts, like the trade name cases, are designed to protect the good will inherent in the trade name. The cases under the Fair Trade statutes, up to this one, have held that sale at less than the price fixed was an "assault upon the good will," and that the value of the right to be protected, as proved by evidence as to the volume of sales and the amount spent for advertising, was sufficient to establish the jurisdictional amount. *Miles Laboratories* v. *Seignious*, 30 F. Supp. 549, 554 (E. D. S. C., 1939); *Caron Corp.* v. *Wolf Drug Co.*, 40 F.

7. The Fourth Circuit's opinion in the *General Shoe* case disposed of the question without discussion. The District Court in the *Safeway* case examined the briefs in the *General Shoe* case in order to analyze the holding on this issue.

Supp. 103, 105 (N. J., 1941); *General Electric Co.* v. *Sabreen*, 128 F. Supp. 900, 901 (E. D. Pa., 1953); *Calvert Distilling Co.* v. *Brandon*, 24 F. Supp. 857 (W. D. S. C., 1938); *James Heddon's Sons* v. *Callender*, 28 F. Supp. 643 (Minn., 1939); *Calvert Distilling Co.* v. *Rosen*, 115 F. Supp. 146, 147 (N. D. Ill., 1953); *Sunbeam Corp.* v. *Richardson*, 144 F. Supp. 583, 587 (W. D. Ky., 1956), reversed on other grounds 243 F. 2d 502 (C. A. 6, 1957).[8]

In the *Miles Laboratories* case, which was subsequently cited and quoted approvingly by the Third Circuit as "perhaps the latest expression of the doctrine" (*John B. Kelly, Inc.* v. *Lehigh Nav. Coal Co.*, 151 F. 2d 743, 747 (C. A. 3, 1945), certiorari denied, 327 U. S. 779 (1946)), the court stated (30 F. Supp. at p. 554):

> "* * * it is a firmly established principle of law that when a litigant seeks an injunction to protect a right, and shows that some invasion of that right has occurred, or been threatened, the test of the jurisdictional amount is the value of the right that is to be protected, and not the extent of the monetary loss or damage that has been suffered or is threatened by the invasion. The reasons for this rule are so obvious, and have been so frequently pointed out in the cases cited, that further discussion of them here can add nothing to what has previously been said.
>
> "The factual allegations of the complaint as to the amount in controversy are directed to that principle of law. They seek to show the value of the right of the plaintiff to sell its product in South Carolina, and to realize upon the value of its goodwill therein

8. In *Schweigmann Bros.* v. *Calvert Distilling Corp.*, 341 U. S. 384 (1951), the allegation was that plaintiff's business, good will and trade-marks were of a value in excess of $3,000 (Tr. of Rec. No. 442, 1950 Term, page 3), and the finding was that plaintiff's rights as sole distributor of Calvert products in Louisiana were worth substantially in excess of $3,000 (*id.* at 84). All parties assumed that this was sufficient for jurisdictional purposes, although it would not be adequate under the rule adopted by the court below.

established, all of which it claims is threatened with disruption by the price-cutting activities of the defendant. The court has no difficulty in reaching the conclusion, from the vast amount spent by the plaintiff in advertising and the resulting substantial volume of sales of its product, that the value of its right to distribute this product to the public in South Carolina is substantially in excess of the jurisdictional amount."

In the other Fair Trade cases cited the evidence was substantially the same. In all, the evidence was precisely what the Court of Appeals found to be inadequate here. It is to be noted that in none of these Fair Trade cases was it said that the good will inherent in plaintiff's trade name or its right to sell its product was completely destroyed by defendant's infringement of plaintiff's rights. The court below has held, however, that unless such complete destruction of the right involved is proved, the test is the amount of damage, not the value of the right. Under this rule all of the decisions referred to—both Fair Trade and unfair competition—were incorrectly decided.

The departure by the Seventh Circuit from the principle which it and other courts of appeals and district courts have been applying in this important field of the law for many years will create uncertainty and confusion which can only be resolved by this Court.

2. The court below rested its ruling on this Court's decisions in *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178 (1936) and *KVOS* v. *Associated Press*, 299 U. S. 269 (1936), as contrasted with *Gibbs* v. *Buck*, 307 U. S. 66 (1939).

It is to be noted that the decisions of the Fifth, Eighth, Ninth, Tenth, Third and Fourth circuits referred to above, as well as the many Fair Trade cases in the district courts, were decided after the *McNutt* and *KVOS* cases. Those

decisions were found to be distinguishable in the *Kelly* and *Caron* cases, *supra*. Whether and how the *McNutt* and *KVOS* cases are to be applied to the present type of situation is a matter on which the other lower courts are obviously not in agreement with the Seventh Circuit and upon which guidance by this Court is necessary.

Those cases did not change the general rule for measuring the amount involved in injunction cases. On the contrary, this Court in *McNutt* reiterated the principle that the value of the object or right to be protected against interference is the standard for measuring the amount involved. In that case an injunction was sought against enforcement of a state law regulating installment sales, and the evidence related to the over-all amount of business done. The Court pointed out that the right to be protected was not the *broad* right to conduct the business, which would be measured by the value of the business, but the *specific* right to be free from regulation by the state (298 U. S. 181).

In *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269 (1936), which involved a radio station's use without permission of Associated Press bulletins, evidence as to the general magnitude of the Associated Press operations was held to be "irrelevant upon the issues of the value of the right for which protection is here sought" (p. 280). Indeed, the Associated Press failed to show that it would suffer any injury at all since it made no profit from furnishing news to its members (299 U. S. 278, 279).

McNutt and *KVOS* thus do not hold, as suggested by the court below (App., *infra*, pp. A4-6, 9), that a plaintiff charging injury to a right must always prove the amount of injury it would suffer. They recognize that plaintiff may prove the value of the specific right to be protected. *But in those cases plaintiff proved the value of the wrong right.*

Here plaintiff's evidence as to large amounts spent for advertising and the volume of sales—even apart from but certainly in combination with the evidence that retailers *would take* Seagram's products "off the shelf" and that sales would be substantially curtailed—established that the good will in plaintiff's trade names far exceeded $3,000 in value, and also that this was true as to the value of the right of plaintiff to have its products sold at the stipulated prices. Since the *Old Dearborn* case, *supra*, this has been universally recognized to be the right sought to be protected in Fair Trade cases.

3. The decision below is inconsistent even with the court's own theory, since uncontradicted evidence shows that plaintiff will suffer much more than $3,000 in damages from defendants' price cutting. Indeed, the evidence here is far stronger than that held by the First Circuit to be sufficient in *Lee-Wilson, Inc.* v. *General Electric Co.*, 222 F. 2d 850 (C. A. 1, 1955).

In the *Lee-Wilson* case, which involved the Massachusetts Fair Trade law, the verified complaint was treated by the Court of Appeals as an affidavit. It alleged (222 F. 2d at 852-3):

> "(1) That the plaintiff had 'expended large sums of money in promoting and advertising said electrical appliances and had established a valuable reputation and good will for the same and for the trade-mark under which they are produced and sold';
>
> "(2) That said trade-mark had a value in excess of $3,000.00;
>
> "(3) That 'the unlawful acts of the defendant, past and threatened, 'have caused and threaten to continue to cause irreparable damage to plaintiff and tend to impair and destroy plaintiff's valuable good will and the value of plaintiff's trade-mark.'
>
> "(4) As a result of the said unlawful acts, other retailers in competition with defendant are placed at

> a competitive disadvantage and therefore purchase fewer of said appliances for resale, promotion of said appliances through cooperative advertising is adversely affected, the threat of a price war exists, and the plaintiff's trade-mark under which said appliances are sold is brought into disrepute with both dealers and the general public.' "[9]. [Numbers and paragraphing supplied.]

Nothing in the *Lee-Wilson* record stated specifically the amount spent for advertising or the quantity of plaintiff's sales or the amount of the loss of sales resulting from the price cutting, or indeed that any of these exceeded $3,000. In the instant case the record contains not merely such general statements as to the amount spent for advertising, and the effect upon plaintiff's trademark and sales, but specific testimony that plaintiff's expenditures for advertising and promotion were over $3,000,000 (I R. 87); that it sold 780,000 cases of whiskey in Illinois per year (I R. 89), the retail price for which would be about $39,000,000, or $3,250,000 per month (II R. 38); and that price-cutting in violation of Seagram's Fair Trade prices "would cut our volume at least 50 per cent in three months' time" (I R. 84, quoted at pp. 4, 5, *supra*).

The court below completely disregarded this last part of Mr. Teece's evidence,[10] which proves that plaintiff was threatened with damage greatly in excess of $3,000 under any theory. Since this evidence was uncontradicted, and indeed undisputed, the court's reversal of the District Court's findings without consideration of this evidence was

9. The above excerpt from the opinion of the Court of Appeals is in substance a complete quotation of all of the pertinent portions of the record in the *Lee-Wilson* case. (See Record Appendix to Brief for the Appellant, Oct. Term, 1954, No. 1944, C. A. 1, pp. 3-5.)

10. It is difficult to understand how or why the court below could have overlooked this testimony, since it was quoted in the court's first opinion. 221 F. 2d, at 877.

a clear violation of Rule 52(a) of the Federal Rules of Civil Procedure, which requires a reviewing court to consider "the entire evidence." *United States* v. *United States Gypsum Co.* 333 U. S. 364, 395 (1948); *United States* v. *Oregon Medical Society*, 343 U. S. 326, 339 (1952); *McAllister* v. *United States*, 348 U. S. 19, 20 (1954).

The opinion below does refer to the testimony of Mr. Lind (I R. 100-101, quoted at pp. 5, 6, *supra*) that:

> "* * * We have found every time there is a price break, our product is subject to loss, and our business has been injured, because we can measure it; because we can see what happens to us in every jurisdiction where there is a price break."

The witness further stated (*ibid.*):

> "If the prices of merchandise are going to be cut by some retailers, the little retailer has to cut the price, which means reducing the profit, *but he doesn't handle the goods any more, and that is where we suffer our loss.*
>
> * * * * *
>
> "The good will of the trade mark is *absolutely almost lost* as the result of a price break. * * * The good-will that was built up for that trade mark over a period of years is *absolutely lost.* * * *" [Italics supplied.]

The court apparently deemed this passage insufficient because it contained no measurement of the extent of injury. But this testimony alone is the equivalent of that found by the First Circuit to be sufficient in the *Lee-Wilson* case, where the averments were that "other retailers * * * purchased fewer of said appliances for resale," and that "the plaintiff's trade-mark under which said appliances are sold is brought into disrepute." Neither Mr. Lind nor the *Lee-Wilson* deponent specifically stated that the loss of sales would exceed $3,000, although in the

one situation as in the other the court could reasonably have so inferred from the magnitude of the operations.

Thus, even if Mr. Teece's testimony as to the amount of damages be overlooked, as it seems to have been by the court below, the evidence which it did consider is substantially identical with that upon which the First Circuit reached a contrary result.[11] It is clear, therefore, that evidence which is deemed sufficient to show the jurisdictional amount in the First Circuit—and we believe also in the other Circuits as well (see pp. 8-13, *supra*)—is not sufficient in the Seventh Circuit.

The court below overturned the District Court's decision in the instant case on the theory that the District Court had merely looked "at the evidence of what was spent in building good will and then, [since] the amount [was] substantial," surmised, "that the amount of the loss is $3,000 or more" (App., *infra*, pp. A9-10). This conclusion was based on a remark uttered by the District Court in another connection, in which the District Court stated that the theory of the plaintiff's action was that as a result of defendants' practices "a loss will result, and a loss probably has resulted because of the advertisement, and because of the cut in prices * * *." (I-R. 103, quoted in opinion below, App., *infra*, p. A10, n. 3.) This statement on its face does not suggest that the District Court did not take into account the actual loss to plaintiff; if it indicates anything, it is the contrary.[12] More importantly, the court below disregarded the District

11. The opinion below implies (App., *infra*, p. A9) that Mr. Lind was about to furnish evidence as to the amount of damages, but that the questioning stopped short of this point. The court overlooked the fact that Mr. Teece had given testimony as to the amount of damages. It was unnecessary for both witnesses to do so.

12. It is to be noted that this statement was made during the hearing on the preliminary injunction, and that the court below affirmed the order made by the District Court at the close of that record.

Court's actual finding (II R. 58-9, quoted at p. 7, *supra*) that the defendant's conduct "will substantially decrease the volume of sales of Seagram products in Illinois * * *." In setting aside the District Court's decision without mentioning either the uncontradicted testimony supporting such finding or the specific finding based upon such evidence, the court below has so flagrantly violated Rule 52(a) as to call for the exercise of this Court's supervisory corrective authority.

CONCLUSION.

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS,

For the Seventh Circuit.

No. 11685 SEPTEMBER TERM, 1956 APRIL SESSION, 1957.

SEAGRAM-DISTILLERS CORPORATION, a Delaware corporation,
Plaintiff-Appellee,

v.

NEW CUT RATE LIQUORS, INC., et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

May 23, 1957.

Before MAJOR, FINNEGAN and SCHNACKENBERG, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Defendants appeal from a judgment of the district court, entered December 5, 1955, which permanently enjoined them from offering for sale or selling Seagram products at less than the prices stipulated by plaintiff from time to time under the Illinois Fair Trade Act[1] and in accordance with contracts made pursuant thereto.

Based upon plaintiff's amended complaint, which defendants answered, the district court, after hearing evi-

1. Ch. 121½, Illinois Revised Statutes, 1955, Sec. 188, *et seq.*

dence, on July 2, 1954 granted a preliminary injunction, having found that action necessary to preserve the *status quo*. We affirmed. 221 F. 2d 815; certiorari denied, 350 U. S. 828.

On final hearing of the case, the district court heard additional evidence and, by stipulation, also considered the evidence heard on the motion for preliminary injunction.

The amended complaint alleges that plaintiff is a Delaware corporation and a citizen of that state, and defendants are citizens and residents of the state of Illinois. It expressly alleges that this is a suit between citizens of different states, and the matter in controversy herein, exclusive of interest and costs, exceeds the sum of $3,000.

It further appears therefrom that plaintiff is the sole authorized Illinois distributor of Seagram beverages, which it sells under the trademarks, brands and names of the producers thereof, and that defendants are engaged in the retail liquor business in Illinois. Plaintiff has expended in Illinois over $500,000 in advertising Seagram products, having sold large quantities thereof in that state.

It is also charged that plaintiff executed fair trade contracts, in accordance with the Illinois Fair Trade Act, with large numbers of retailers in Illinois, and announced stipulated retail prices of Seagram products, that notice thereof was given to defendants and that they continued advertising, offering for sale or selling of Seagram products at less than the stipulated prices, to the irreparable damage of the good will and business of the plaintiff, that, unless defendants are enjoined, plaintiff will suffer further irreparable damage in a decrease in its sales and others dealing in said products will fail to comply with its fair trade contracts, all to the great damage and financial loss of plaintiff.

Federal jurisdiction was challenged by defendants, both

in their answer and by a motion made at the time of the final hearing on the merits. They now argue that plaintiff failed to establish federal jurisdiction in that no competent evidence was introduced to prove that the matter in controversy, exclusive of interest and costs, exceeded the sum of $3,000.

1. Plaintiff in such a case must carry throughout the litigation the burden of showing that it is properly in court. *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269. If its allegations of jurisdictional facts are challenged by its adversary in any appropriate manner, it must support them by competent proof. *McNutt* v. *General Motors Corp.*, 298 U. S. 178, 189.

In an attempt to sustain its burden, plaintiff succeeded in introducing, over the objection of defendants as to its competency, evidence which, plaintiff contends, tended to prove the value of its good will in the Seagram products. Its witness Teece testified that "for the past two or three years, in excess of $3,000,000 was spent by plaintiff in Illinois advertising, as well as promotion, and outdoor signs." Thereon the district court made a finding of fact that the matter in controversy, exclusive of interest and costs, exceeds the sum of $3,000. It thereupon concluded that it had jurisdiction.

In *Old Dearborn Co.* v. *Seagram Corp.*, 299 U. S. 183, which upheld the constitutionality of the Illinois Fair Trade Act, the court, at 195, referred to section 2 of the act, which reads:

> "Section 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

It said that section 2 "interferes only when he [purchaser of the commodity] sells with the aid of the good will of the vendor; and it interferes then only to protect that good will against injury". At 198, it added:

> "* * * the sole purpose of the present law is to afford a legitimate remedy for an *injury* to the good will which results from the use of trade-marks, brands or names, * * *." (Italics supplied.)

The district court did not note that, when the $3,000 requisite for jurisdiction[2] is challenged in an action brought in a federal court for the protection of a right belonging to plaintiff, there is an important distinction between two classes of diversity cases.

In one class (which we shall call class A), a plaintiff charges wrongful acts by a defendant, or by several defendants acting jointly, which have, or will, injure or damage a right for which plaintiff seeks protection. In such a case, if plaintiff shows that the alleged *injury or damage* caused or threatened by a defendant, or by several defendants acting jointly, amounts to at least $3,000, the federal court has jurisdiction.

In the other class of diversity cases (which we shall call class B), a plaintiff charges wrongful acts by a defendant, or by several defendants acting jointly, which, if not prevented, will completely deny or destroy the right for which plaintiff seeks protection. In such a case, if plaintiff shows that the right is worth at least $3,000, the federal court has jurisdiction.

This distinction is made apparent by cases to which we now refer.

2 28 U. S. C. A. § 1332.

CLASS A.

In *McNutt* v. *General Motors Corp.*, 298 U. S. 178, General Motors sued in a federal district court to restrain the enforcement of an Indiana act providing for the regulation of the business of purchasing contracts arising out of retail installment sales, on the ground that the act was invalid. Although the complaint, to show federal jurisdiction, set forth the net worth of General Motors' business in Indiana covered by the act and other facts tending to prove the value of its right to carry on that business in that state, the court, at 181, said:

> "Respondent [General Motors] invokes the principle that jurisdiction is to be tested by the value of the object or right to be protected against interference. * * * But in the instant case, the statute does not attempt to prevent respondent from conducting its business. There is no showing that it cannot obtain a license and proceed with its operations. The value or net worth of the business which respondent transacts in Indiana is not involved save to the extent that it may be affected by the incidence of the statutory regulation. The object or right to be protected against unconstitutional interference is the right to be free of that regulation. The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed. The particular allegations of respondent's bill as to the extent or value of its business throw no light upon that subject. They fail to set forth any facts showing what, if any, curtailment of business and consequent loss the enforcement of the statute would involve. The bill is thus destitute of any appropriate allegation as to jurisdictional amount save the general allegation that the matter in controversy exceeds $3,000. That allegation was put in issue and the record discloses neither finding nor evidence to sustain it."

In *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269, Associated Press sued in a federal district court to enjoin

the proprietor of a radio station from pirating news gathered by Associated Press for use of its members. The district court held that the jurisdictional requirement now under consideration had not been met, and dismissed the suit. The Court of Appeals disagreed and held that Associated Press had shown the requisite fact of jurisdiction. The Supreme Court reversed the Court of Appeals, pointing out, at 278, that the only attempt by Associated Press to show jurisdiction by competent proof was an affidavit to the effect that payments made by newspaper members for news sold to them by Associated Press were upwards of $8,000 per month, "* * * 'which is being imperiled and jeopardized by the acts of defendant * * * and said sum greatly exceeds the sum of Three Thousand Dollars, exclusive of interest and costs, and complainant is in danger of losing said memberships and payments if defendant's practices in respect to pirating said news is not enjoined.'" The Supreme Court, at 279, in rejecting this attempt to show jurisdiction, said "no intimation is given of the character or extent of the damage they [the members] would suffer by such withdrawal. The respondent having failed to support the allegations as to amount in controversy the District Court should have dismissed the bill."

CLASS B.

In *Gibbs* v. *Buck*, 307 U. S. 66, a class suit was filed by and on behalf of the members of a society against the Florida attorney general and others charged with the enforcement of a state act directed at organizations like the society. The complaint charged that the act was unconstitutional and deprived complainants of rights without due process of law and without equal protection of the laws, etc. By a motion to dismiss, the defendants urged that the

complaint affirmatively showed that the jurisdictional amount of $3,000 was not involved. The court, at 74, said:

> "The essential matter in controversy here is the right of the members, in association through the Society, to conduct the business of licensing the public performance for profit of their copyrights. This method of combining for contracts is *interdicted* by the Florida statute. It is not a question of taxation or regulation but *prohibition*. Under such circumstances, the issue on jurisdiction is the value of this *right* to conduct the business free of the *prohibition* of the statute. * * *" (Italics supplied.)

After pointing out the facts in the complaint relating to the value of this right, the court, at 75, said:

> "* * * From these facts, the finding of the District Court that the matter in controversy—the value of the aggregate *rights* of all members to conduct their business through the Society—exceeds $3,000 in value is fully supported." (Italics supplied.)

The court pointed out that the test was different in the *McNutt* and *Associated Press* cases, *supra*, stating, at 75:

> "*McNutt* v. *General Motors Acceptance Corp.* differs. There the State of Indiana had passed an act regulating, not prohibiting, the business of the Acceptance Corporation. The right for which protection was sought was the right to be free of regulation. It was to be measured by the loss, if any, following enforcement of regulation. This was not alleged or proved. In *KVOS, Inc.* v. *Associated Press*, relief was sought to enjoin alleged pirating, by radio, of news furnished by the Associated Press to its members. The right for which protection was sought was 'the right to conduct those enterprises free of' interference. On the issue of the value of this right, it was deposed only that the Associated Press received more than $8,000 per month for news in the territory served by the broadcasting station and was in danger of losing the payments. The Associated Press was a nonprofit corporation, op-

erated without the purpose of profiting from its services to members and equitably dividing the expenses among them. The damage in the *Associated Press* case was to its members and this was not shown. Neither was it alleged or proved that any member threatened to withdraw or to reduce its payments."

In *Brotherhood* v. *Pinkston*, 293 U. S. 96, a widow, for the purpose of protecting her right to future participation in a fund from which she was entitled to receive a pension in monthly payments during her lifetime as long as she remained unmarried, brought a suit in a federal district court which dismissed the suit on the ground that the requisite amount of $3,000 was not involved. The Supreme Court, at 99, treated the value of the widow's interest in the fund as the test of jurisdiction. It pointed out that her life expectancy was shown to bring the value of the future pension installments to a sum in excess of $3,000 despite the contingency of her remarriage. The court held that federal jurisdiction existed.

In *Berryman* v. *Board of Trustees of Whitman College*, 222 U.S. 334, a college sued in a federal circuit court to enjoin the collection of taxes on its property on the ground that a perpetual contract of exemption from taxation involved the amount essential to sustain federal jurisdiction, where the contract right exceeded in value that amount, although the current taxes assessed and levied were less than that sum. The defendants challenged jurisdiction. The Supreme Court held that the lower court had jurisdiction because the value of the thing at issue, the contract right, exceeded in value the then jurisdictional requirement of $2,000. It pointed out that the claimed exemption covered, not only a current tax of $946.32, but extended to all future taxes.

In the record before us there is no evidence that the monetary value of the damage or injury to plaintiff's good

will, sustained or threatened by defendants' acts, exceeds $3,000. It appears that its witness Lind was about to furnish evidence which might have been relevant on that point. He was general counsel for plaintiff and he was permitted, over objection, to testify that in a price war in the liquor market "our product is subject to loss, and our business has been injured, *because we can measure it*, because we can see what happens to us in every jurisdiction where there is a price break." (Italics supplied.) The measure to which he referred was not otherwise identified or produced in court. Whether the measure was accurate we do not know. Lind's reference to it indicates that he, a lawyer and business man acquainted with plaintiff's affairs, recognized that the injury claimed to result to plaintiff's business in a price break was susceptible of pecuniary measurement which could be adduced in an effort to prove jurisdiction. On that issue competent evidence of the character and extent of the damage to good will would have been relevant.

Defendants' acts did not prevent plaintiff from using its good will in the conduct of its business. The damage to plaintiff's good will caused or threatened by defendants' acts is the subject of controversy in this case. Plaintiff has failed to prove any facts showing what, if any, curtailment of business and consequent loss have been or are likely to result from defendants' acts. *McNutt* v. *General Motors Corp.*, 298 U.S. 178, 181.

It is improper, in the absence of evidence of the amount of damage sustained or threatened, to look at the evidence of what was spent in building good will and then, if the amount be substantial, to surmise that the amount of the loss is $3,000 or more. Yet this is, in effect, the method by which the district court, in stating its theory of this action,

reached the conclusion that it had jurisdiction.[3] A similar method of reasoning was disapproved by the Supreme Court in *KVOS* v. *Associated Press*, 299 U. S. 269, at 276:

> "* * * Dealing with the petitioner's insistence that the amount in controversy was not shown to exceed three thousand dollars the court [Court of Appeals] held * * * that 'The several millions of dollars here alleged to be invested in the Association's business * * * may well be damaged to the extent of $3,000 by the pirating practices described.' After referring to the character and scope of the respondent's activities the court states:
>
> > 'It is obvious that the business of gathering and distributing to members, *before* profitable publication, *could conceivably be damaged* to the extent of $3,000 by the misappropriation and premature publication of the news material. To hold otherwise would warrant the inference that no corporation could be damaged by a wrongful attack on its business, when that business happened to be run at no profit or at a loss. Also, we are unable to hold irrational the claim that the piracy caused a $3,000 damage to the Association's quasi property right in the news.'" (Italics supplied except word "before".)

and at 277:

> "* * * The complaint contains nothing to the purpose save the general statement that the damage to which the respondent is being subjected is in excess of three thousand dollars and the amount involved is in excess

3. The following colloquy occurred.

"The Court: The theory of this action—I am not deciding the motion, but in this practice of the defendant here, as alleged in the complaint, a loss will result, and a loss probably has resulted because of the advertisement, and because of the cut in prices, that is substantially the position of the plaintiff, is it?

"Mr. Kohn [plaintiff's attorney] Yes.

"Mr. Schultz [defendants' attorney] This Court has no jurisdiction unless they can prove damage of $3,000 or more."

> of that sum. * * * But where the allegations as to the amount in controversy are challenged by the defendant in an appropriate manner, the plaintiff must support them by competent proof." * * *"

and at 279:

> "* * * the allegation of possible damage * * * is wholly inadequate, because * * * no intimation is given of the character or extent of the damage * * *. The respondent having failed to support the allegations as to amount in controversy the District Court should have dismissed the bill."

It is apparent that the district court erred in holding that the matter in controversy herein exceeds the sum of $3,000. The district court had no jurisdiction of this case. Illinois' courts are open to plaintiff.

2. On the record before us, we are not concerned with the principle of *res judicata*. Neither in this court nor in the district court did plaintiff urge that that principle applied to the district court's finding in favor of its jurisdiction, as contained in its order for the issuance of a preliminary injunction.

In *Murrell* v. *Stock Growers' Nat. Bank of Cheyenne*, 74 F. 2d 827, at 832, the court said:

> "A party may waive his right to assert the conclusiveness or bar of a judgment under the doctrine of res judicata."

To the same effect, see 50 C. J. S. 15 and 389.

Not only was the rule of res judicata not relied on by plaintiff in the district court, but that court proceeded to determine anew that it had jurisdiction, when it conducted the hearing which culminated in the judgment from which the present appeal was taken. Several circumstances make this clear. It was stipulated by counsel that all the testi-

mony taken on the hearing for a preliminary injunction should be used on the final hearing of the case. This included testimony of Lind and Teece, which in large part was offered to establish jurisdiction. The remarks of the district judge indicate that he felt that his ruling on jurisdiction at the preliminary hearing was correct and that he was ruling the same way upon the final hearing. He thereupon made a finding of fact that the matter in controversy herein, exclusive of interest and costs, exceeds the sum of $3,000 and he entered a conclusion of law that the court had jurisdiction of the subject matter of the action.

In plaintiff's brief it is frankly stated:

> "Upon defendants' appeal from the preliminary injunction entered in this cause, this Court held that the District Court's finding of fact that federal jurisdiction existed was supported by the evidence (221 F. 2d 815, 819). *After the trial on the merits the same finding was made upon the same evidence.* * * *" (Italics supplied.)

These circumstances show that no one contended in the final hearing that the court's order for a preliminary injunction barred it from making, nor that it did not make, an independent adjudication on the matter of jurisdiction at the time of the final hearing.[4] We, therefore, have a right on this appeal to review the correctness of the latter decision.

For the reasons hereinabove set forth the judgment of the district court is reversed.

JUDGMENT REVERSED.

4. On the prior appeal, 221 F. 2d 815, 819, we said:

> "While considerable evidence was received by the district court, a final hearing upon the issues did not take place. The evidence was received so that the court might have an opportunity to exercise its discretion upon the motion for temporary injunction. * * *"

FINNEGAN, *Circuit Judge*, Dissenting. Actually this is an action by Seagram Distillers Corp. to enjoin the multiple defendants from advertising, offering for sale or selling Seagram products at less than the prices stipulated from time to time in accordance with the Fair Trade contracts entered into by Seagram Distillers Corporation in the State of Illinois. A preliminary injunction was granted below and we affirmed that restraining order. 221 F. 2d 815. After our remand the parties stipulated in the district court:

> "Plaintiff is, and at all times mentioned in the complaint has been engaged throughout the United States and Illinois, in the business of dealing in, selling and distributing alcoholic beverages of standard quality produced by Joseph E. Seagram & Sons, Ltd., Joseph E. Seagram & Sons, Inc., and corporations affiliated with said corporations. Said beverages (sometimes hereinafter referred to as 'Seagram products') include Seagram's V. O., Seagram's Seven Crown Blended Whiskey and Seagram Ancient Bottle Gin, and are sold in various sized bottles, the labels or containers of which bear the trade marks, brands or names of Joseph E. Seagram & Sons, Ltd., Joseph E. Seagram & Sons, Inc. or of corporations affiliated with said corporation, which are the producers thereof. Each of the beverages is, and during all of the times mentioned in the complaint was, in free, fair and open competition with commodities of the same general class, produced by others, and sold and distributed throughout Illinois. Plaintiff herein has for several years prior to the dates mentioned in the complaint expended large sums of money in advertising Seagram products and during the past several years plaintiff expended for such purpose an amount in excess of Five Hundred Thousand Dollars ($500,000.00) in Illinois alone, and the trade marks, brands or names under which Seagram products are sold have become widely and favorably known to the trade and public generally in Illinois and plaintiff has sold large quan-

> tities of each of said products in Chicago and throughout Illinois.
>
> Plaintiff is and continuously, since long prior to the dates mentioned in the complaint, has been the sole person authorized by the producers of Seagram products to sell and distribute said products in Illinois, and has during all of said time made sales of said products to various wholesale distributors throughout Illinois.
>
> Plaintiff has executed so-called Fair Trade contracts with large numbers of retailers of alcoholic beverages in Illinois. A copy of the form of said executed contracts is attached hereto as Exhibit A."

That, in my judgment, is not merely an ineffectual stipulation to confer jurisdiction on the district court, but rather a stipulatio of the matter in controversy. Plaintiff's vice-president, Teece, in charge of Central Division of Seagram-Distillers Corporation testified in substance during the preliminary injunction hearings that his company spent in excess of $300,000 for advertising promotion and outdoor signs in Illinois, all in connection with Seagram products. Use of that first record was authorized by order of this court based on the parties' agreement.

Plaintiff brought this action to protect good will manifested under paragraph 3 of the stipulation, quoted above. But I refrain, for the purposes of this dissent from reaching other points raised by defendant's appeal which incidently are far more serious than the short treatment accorded them by the majority.

Under 28 U. S. C. § 1332 "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between: (1) Citizens of different States . . ." "By matter in dispute," Mr. Justice Field wrote in *Smith* v. *Adams*, 130 U. S. 167, 175 (1889) "is meant the subject of litigation, the matter upon which

the action is brought and issue is joined, and in relation to which, if the issue be one of fact, testimony is taken. It is conceded that the pecuniary value of the matter in dispute may be determined, not only by the money judgment prayed, where such is the case, but in some cases by the increased or diminished value of the property directly affected by the relief prayed . . ." Starting with *Glencoad Light Co.* v. *Mutual Light Co.*, 239 U. S. 117 (1915) there is a line of decisions in various federal courts, permitting "the jurisdictional amount to be calculated on the basis of the property right which is being injured." *John B. Kelly* v. *Lehigh Nav. Coal Co.*, 151 F. 2d 743, 746 (8th Cir. 1945); *First English L. Church* v. *Evangelical L. Synod*, 135 F. 2d 701 (10th Cir. 1953); *Purcell* v. *Summers*, 126 F. 2d 390 (4th Cir. 1942). And several of the district judges in our own circuit have thought that in Fair Trade cases the jurisdictional amount is measured by the value of the right to be protected. *See e. g. Calvert Distillers Corp.* v. *Rosen*, 115 F. Supp. 146 (D. C. Ill. 1953).

McNutt v. *General Motors, etc., Corp.*, 298 U. S. 178 (1936) rests upon an attack directed at a regulatory statute. There General Motors sought to restrain enforcement of an Indiana Act regulating the business of purchasing contracts arising out of retail installment sales. In the case before us we are not dealing with state taxation or its regulatory authority but with an alleged invasion by the defendants of a right asserted by plaintiff. If the plaintiff's alleged right fails because of some defect in the Illinois Fair Trade Act that is something else and should be faced. But to stop short and reverse this case on the mechanical basis of a tenuous determination of the jurisdictional dollar sign is an approach I refuse to pursue.

APPENDIX B.

Preliminary Injunction and Supporting Findings.

(from I R. 30-35.)

IN THE UNITED STATES DISTRICT COURT.

* * (Caption—No. 54 C 832) * *

ORDER.

This cause coming on to be heard on motion of Seagram-Distillers Corporation, plaintiff herein, for a preliminary injunction, upon plaintiff's verified amended complaint, the verified answer of defendants and the affidavit of Edward M. O'Brien filed herein in support of plaintiff's motion for a preliminary restraining order, and upon the evidence introduced by the parties in open Court, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT.

1. Defendants are engaged in the business of selling alcoholic beverages at retail at various locations in Chicago, Illinois, except for the defendant Foremost Promotions, Inc., an Illinois corporation, engaged in the business of promoting the sale of alcoholic beverages sold at retail by the other defendants at their various stores and in preparing and causing to be published advertisements for the sale of such alcoholic beverages on behalf of said defendants, among which advertisements was the advertisement in the June 15, 1954 edition of the Chicago Sun-Times complained of herein.

2. Plaintiff is and has been engaged in the State of Illinois for more than fifteen years in the business of dealing in, selling and distributing alcoholic beverages of standard quality produced by Joseph E. Seagram & Sons, Ltd., Jo-

seph E. Seagram & Sons, Inc., and corporations affiliated with said corporations. Plaintiff is the sole person authorized by said producers to sell and distribute Seagram products in Illinois and sells the same to licensed distributors only. Said beverages, hereinafter referred to as Seagram products, include Seagram's V. O., Seagram's Seven Crown Blended Whiskey and Seagram's Ancient Bottle Gin, are sold in various sized bottles bearing the trade-marks, brands and names of the producers thereof, and are and have been in free, fair and open competition with commodities of the same general class, produced by others, and sold and distributed in Illinois. It has in the past three years expended approximately $3,000,000 in advertising and promoting the sale of Seagram products in Illinois and the trade-marks, brands and names under which Seagram products are sold have become widely and favorably known to the trade and public generally in Illinois.

3. The matter in controversy herein, exclusive of interest and costs, exceeds the sum of $3,000.

4. Plaintiff is a Delaware corporation. The corporate defendants are Illinois corporations and the individual defendants are all citizens and residents of the State of Illinois.

5. Plaintiff long prior to the defendants' acts complained of in the Complaint executed numerous Fair Trade contracts in Illinois in accordance with the Illinois Fair Trade Act, which contracts are now in full force and effect. Sales of Seagram products in Illinois have been subject to the provisions of such contracts which provide that said Seagram products shall not be sold, advertised or offered for sale within Illinois below the prices stipulated by plaintiff in written schedules. Prior to the acts complained of defendants received schedules of the prices stipulated pursuant to such contracts, which prices have been in full force and effect since April 15, 1953.

6. Defendants, notwithstanding the provisions of said Fair Trade contracts and the prices stipulated by plaintiff in accordance therewith, and notwithstanding plaintiff's insistence that said defendants comply therewith, did on or about June 15, 1954, wilfully and knowingly advertise, offer for sale or sell Seagram products at prices below those stipulated therefor.

7. Unless enjoined, defendants intend to continue said conduct complained of, to the irreparable damage of the good will and business of the plaintiff herein and of the producers of said Seagram products, thereby impairing the value of the trade-marks, brands and names under which Seagram products are sold.

8. Such wrongful conduct of defendants if not enjoined will cause others dealing in Seagram products to fail to comply with the aforesaid Fair Trade contracts, will substantially decrease the volume of sales of Seagram products in Illinois, and will substantially impair the good will of the plaintiff and the good will of the trade-marks, brands and names of the producers of Seagram products, all to the great damage and financial loss of the plaintiff.

9. None of the matters complained of involves sales made by any officer acting under the order of any court, or sales for the purpose of closing out said defendants' stocks of Seagram products, or sales of products damaged or deteriorated in quality.

10. Plaintiff is and has been vigorous, fair and diligent in the enforcement and maintenance of its Fair Trade prices in Illinois by all appropriate methods, including many legal proceedings.

11. The evidence does not support defendants' asserted claim of abandonment by plaintiff of its Fair Trade program in Illinois or defendants' claim that plaintiff has unreasonably failed and refused to take appropriate action

against retail dealers alleged to have been selling Seagram products at prices below those stipulated by plaintiff in accordance with its Fair Trade contracts.

12. The irreparable injury to the good will and business of plaintiff which would be suffered by it if defendants are not enjoined from advertising, offering for sale and selling Seagram products at less than the Fair Trade prices stipulated therefor, during the period prior to final adjudication herein, would be substantially greater than any loss or damage which could then be suffered by defendants as the result of the issuance of an injunction.

13. A preliminary injunction is necessary to preserve the *status quo* now existing until the final determination of the controversy herein.

Conclusions of Law.

1. The Court has jurisdiction of all the parties and of the subject matter of this action.

2. The Illinois Fair Trade Act is valid and constitutional.

3. Plaintiff's Fair Trade contracts entered into with numerous retailers in Illinois are valid and conform to the requirements of the Illinois Fair Trade Act and applicable federal law and Seagram products are sold and distributed by plaintiff in Illinois in accordance with said Fair Trade contracts.

4. The advertising, offering for sale or selling of Seagram products below the Fair Trade prices stipulated therefor is in violation of the Fair Trade contracts entered into by plaintiff and is in direct violation of plaintiff's rights thereunder and under the Illinois Fair Trade Act, and such advertising, offering for sale and selling of Seagram products by defendants should be restrained and enjoined.

5. Plaintiff is and has been reasonably, fairly and diligently enforcing its Fair Trade prices in Illinois by all appropriate means, and has not abandoned or waived its Fair Trade program in Illinois.

6. Plaintiff has no adequate remedy at law.

7. The action and threatened action of the defendants in advertising, offering for sale and selling Seagram products at less than the prices stipulated therefor pursuant to said Fair Trade contracts will result in direct, immediate and irreparable injury to plaintiff, and it is therefore entitled to equitable relief.

8. There is a reasonable probability that plaintiff will prevail upon the final determination of the controversy herein.

9. The balance of convenience or injury is resolved in favor of plaintiff and a preliminary injunction is necessary to prevent irreparable injury to it.

It is Ordered, Adjudged and Decreed that pursuant to stipulation, David Feltzer and Foremost Promotions, Inc. shall be and they hereby are substituted in the amended complaint for defendants Winifred W. Cash and Foremost Liquor Stores, Inc., respectively, and the appearance and answer filed by certain defendants on June 15, 1954 shall stand as the appearance and answer of said defendants David Feltzer and Foremost Promotions, Inc.

It Is Further Ordered, Adjudged and Decreed that

New Cut Rate Liquors Inc.
B & B Liquors, Inc.
Albert Vaitaitis
Harry Silverman
Jack Lavine and Robert Lavine
David Feltzer
Sam Malkin and Maurice Robin
Henry Newman and Rebecca Newman
James L. Horan

Milton M. Chemers
Nick Pintozzi
Thomas Pape
Frank Pintozzi
Ed's Liquors, Inc.
Diversey Liquors Corporation
Friendly Liquor Mart, Inc.
Octavio Narcisi, Nick Brunetti and Feliz Giannattasio
Glenn Liquor Co. Inc.
Binstein, Inc.
Lena Paterno
Jesse Bergandi and Frank Bergandi
Martin R. O'Connor and Martin F. Conroy
Healie Schwartz and Louis Schwartz
Jack Lavine and Myer L. Fellars
Bill and Rose Ridell
Westown Liquors, Inc.
26th and Kedzie Liquor Co. Inc.
Ontario Pharmacy, Inc.
Leon H. Phillips
McCoy Liquor Stores, Inc.
The Real McCoy, Inc.
Roosevelt Wines & Liquors, Inc.
Morris Rubin
Jack Segal
Stanley Lutz
Soifer & Sons, Inc.
Sun Pay Less Drugs, Inc.
Sun Cut Rate Drugs, Inc.
Sun Self-Serv, Drugs, Inc.
Leonard L. Freeman
Betty Malkin
James Castaldo
The Malkin Company, Inc.
Harry Schwarzbach
Lawrence & Western Wines & Liquors, Inc.
Foremost Promotions, Inc.
Sam Rosen
Jack Kanarish
Jack W. Kerschner
Sylvia, Leonard and Leonore Robins

defendants herein, their agents, servants, employees, attorneys, successors and assigns, and each and every one of them be, and they are hereby jointly and severally enjoined and restrained from wilfully and knowingly advertising, offering for sale or selling Seagram products, including but not limited to Seagram's V.O., Seagram's Seven Crown Blended Whiskey and Seagram's Ancient Bottle Gin, in Illinois, at less than the prices stipulated by Seagram-Distillers Corporation from time to time under the Illinois Fair Trade Act and in accordance with contracts made pursuant to said Act, which contracts at the time of the filing of the complaint herein were, now are or may hereafter be in force in Illinois relating to the sale or resale of any of said Seagram products in that state.

It Is Further Ordered that the bond heretofore filed by plaintiff pursuant to the temporary restraining order of this Court shall stand as a penal bond for the payment of such costs and damages as may be incurred or suffered by any party who shall be found to have been wrongfully enjoined or restrained, and that this preliminary injunction remain in full force and effect until the final hearing of this cause and until further order of this Court.

Enter this 2nd day of July, 1954:

JULIUS J. HOFFMAN,
Judge.

APPENDIX C.

Statutes Involved.

28 U. S. C. A. § 1332

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:

(1) Citizens of different States;

(2) Citizens of a State, and foreign states or citizens or subjects thereof;

(3) Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

ILLINOIS FAIR TRADE ACT

Ill. Rev. Stat. (1955), c. 121½, §§ 188-191.

AN ACT to protect trade mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a trade mark, brand or name.

Section 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of any of the following provisions which may be contained in such contract:

(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

(2) That the producer or vendee of a commodity re-

quire upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity: provided, however, that such stock is first offered to the manufacturer of such stock at the original invoice stock price, at least ten (10) days before such stock shall be offered for sale to the public.

(2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(3) By any officer acting under the orders of any court.

Sec. 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

Sec. 3. This Act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

The provision of this Act shall not apply to any contract or agreement relating to any commodity for library purposes which may be sold or offered for sale to the State of Illinois or to any of its administrative agencies or political subdivisions, or to any municipality, or to any free public library, endowed library, college, university, or school library in this State.

Sec. 4. This Act may be known and cited as the "Fair Trade Act."